



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

CEPR-P (715)

05 FEB 1999

MEMORANDUM FOR COMMANDERS, ALL MAJOR SUBORDINATE COMMANDS,  
DISTRICT COMMANDS, FIELD OPERATING ACTIVITIES AND  
LABORATORIES; ATTN: DIRECTORS/CHIEFS OF  
CONTRACTING

SUBJECT: PARC (Principal Assistant Responsible for Contracting) Instruction Letter 99-4, Use of EFARS  
Contract Funding Clauses

1. References:

- a. EFARS 32.7 – Contract Funding.
- b. EFARS 52.232-5001 – Continuing Contracts (MAR 1995).
- c. EFARS 52.232-5002 – Continuing Contracts (Alternate) (MAR 1995).

2. Due to the inconsistent usage of the EFARS's clauses referenced in 1.b. and c. above, the following clarification and guidance, in coordination with the Directorate of Civil Works (Construction Branch and Programs Management Division), is provided for use with civil works contracts. Reference 1.a. is the regulation that authorizes and prescribes the use of the two clauses.

3. There are two types of projects for which Continuing Contracts may be used. Following is each type with the required clause to be used:

a. Civil Works contracts for **projects that have been specifically authorized by Congress** and have a portion of the contract price dependent upon reservation of funds from future appropriations, known as "Continuing Contracts"; EFARS Clause **52.232-5001, CONTINUING CONTRACTS (MAR 1995), shall be used for these types of contracts.**

b. Civil works contracts that are incrementally funded when **no contracting authority exists** to obligate the entire contract price in advance of appropriations. These are **continuing authorities** projects for which the Secretary of the Army, acting through the Chief of Engineers, is authorized to plan, design, and construct certain types of water resources improvements **without specific Congressional authorization**. These projects comprise the Continuing Authorities Program when referred to as a group and are set forth in ER 1105-2-100, Chapter 3, 28 December 1990, EC 1105-2-214, 30 November 1997, and EC 1105-2-209, 31 August 1995; EFARS Clause **52.232-5002, CONTINUING CONTRACTS (ALTERNATE) (MAR 1995), shall be used for the Continuing Authorities program.**

4. The amount to be inserted in the blank in subparagraph (b) of EFARS Clause 52.232-5001 and the blank in subparagraph (a) of EFARS Clause 52.232-5002 shall be an amount of funds reserved for the contractor

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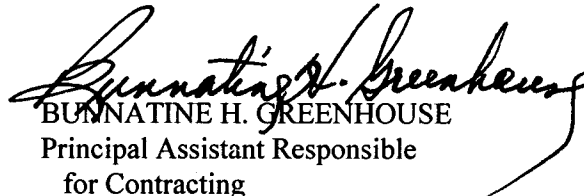
that will permit him to commence and prosecute the work in accordance with the contract and the guidelines noted in paragraph 5.

5. For each fiscal year, during the life of a continuing contract, each district will receive a work allowance for each of its projects and determine the amount to be allocated to each on-going contract. The Project Manager shall compare this amount with the amount needed by the contractor to fully execute the approved schedule, with consideration for anticipated performance or dependability of performance to date. If the amounts agree, a letter to the contractor will be prepared by the Contracting Officer, in coordination with the Project Manager, informing him of the anticipated amount that will be reserved for the contract for the fiscal year. If the amounts do not agree, the Project Manager shall confer with the Program Review Board (PRB) to point out impacts and reconcile the differences. Once reconciliation is made, a letter to the contractor will be prepared by the Contracting Officer, in coordination with the Project Manager, informing him of the anticipated amount that will be reserved for the fiscal year. The letter shall emphasize that this reserved amount is anticipated to be made available to the contractor during the fiscal year; however, a modification to the contract will be forthcoming in the amount to be reserved, and this amount could be different from the anticipated amount. Additionally, the letter shall inform the contractor that in those instances wherein the amount reserved will be exhausted before the end of the fiscal year, the contractor should give the notices required by either EFARS Clause 52.232-50001(e) or 52.232-5002(d) (reference the specific clause that is in the contract).

6. The Contracting Officer, in consultation with the Project Manager, will determine the actual amount to be reserved on the contract, either in a lump sum for the fiscal year or a piecemeal amount, and an administrative modification shall be prepared in that amount. If the amount is piecemeal, additional modifications will be required in a timely fashion throughout the fiscal year. Block D. of the SF 30 will be marked, annotate that this is an administrative modification, and the authority will be the appropriate EFARS "Continuing Contract" clause contained within the contract. Nevertheless, only funds that will be expended in the current fiscal year should be reserved to each continuing contract. Requirements for additional funds, which develop during the fiscal year, have to be met by reprogramming funds from other projects. Reserved funds that cannot be expended in the current fiscal year will only exacerbate the problem of finding sources of funds for reprogramming actions.

7. Our point of contact for this action is Mr. Roger Adams, (202) 761-5221.

FOR THE COMMANDER:

  
BUNNATINE H. GREENHOUSE  
Principal Assistant Responsible  
for Contracting



## DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

REPLY TO  
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27 Oct 1998

MEMORANDUM FOR COMMANDERS, ALL MAJOR SUBORDINATE COMMANDS,  
DISTRICT COMMANDS, FIELD OPERATING ACTIVITIES AND  
LABORATORIES; ATTN: DIRECTORS/CHIEFS OF  
CONTRACTING

SUBJECT: PARC (Principal Assistant Responsible for Contracting) Instruction Letter 99-3, Time  
Limits for Decisions by Contracting Officers on Contractor Claims

1. References:

- a. FAR 33.211(c) – Contracting Officer Decision.
- b. Chief Trial Attorney Note, CECC-F, 04 JUN 1998, no subject, enclosure 1.
- c. Armed Services Board of Contract Appeals (ASBCA) Nos. 51195 and 51197, 19 May 1998, enclosure 2.

2. Reference a. states that contracting officers shall issue decisions for claims within the following time limitations:

- a. For claims of \$100,000 or less, 60 days after receiving a written request for a final decision from the contractor, or within a reasonable time after receipt of the claim if the contractor does not make such a request.
- b. For claims over \$100,000, 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor (within that 60 day period) of the time within which a decision will be issued. However, neither the Contract Disputes Act of 1978 nor the FAR provide any specified time limit for issuing a decision.

3. Reference b. is the Chief Trial Attorney Note that provided guidance to Corps trial attorneys concerning the ASBCA decisions, reference c. above.

4. Reference c. consists of two (2) ASBCA cases wherein the contracting officer notified the contractor of specific dates by which the contracting officer would render a decision on the claims, but the ASBCA found the specified dates as unreasonable. The Government timely notified the contractor of the dates by which decisions would be issued on the two claims submitted by the contractor (these dates were approximately 16 months after the receipt of the 1<sup>st</sup> claim and 14

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months after receipt of the 2<sup>nd</sup> claim). The contractor alleged that these dates were unreasonable and interpreted such unreasonableness as a deemed denial of their claims; therefore, the contractor appealed (under the Contract Disputes Act) these denials to the ASBCA.

5. ASBCA concluded that the dates established by the contracting officer for issuance of decisions were unreasonable. They stated: (a) that there was no justification for establishing a 14-month period for deciding the one claim, to all appearances a relatively small, straightforward construction claim; and, (b) although the other claim was larger and more complex, prior to its submission the Government had performed an extensive analysis of the contractor's underlying proposal, with the benefit of an audit, and determined it had no merit. With this background, it was unreasonable to establish a further time period of 16 months for issuing a decision.


6. In cases alleging a deemed denial of a claim, it is not enough to show that the contracting officer established a firm date for a final decision. Rather, the Government has the burden of proving that the date established is reasonable.

7. Contracting officer's shall, when establishing a date longer than 60 days for issuing a final decision on a claim, document their reasons for doing so and include them in the contract file. By doing so the Corps will have contemporaneous evidence to demonstrate to a Board or court that the date established was reasonable.

8. Our point of contact for this action is Mr. Roger Adams, CEPR-P, (202) 761-5221.

FOR THE COMMANDER:

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BUNNATIVE H. GREENHOUSE  
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